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No. 04-1328

Supreme Court, U.S.
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In The
Supreme Court of the United States

BRIAN BUSH FERGUSON,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The West Virginia Supreme Court Of Appeals

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The West Virginia Supreme Court of Appeals ruled in a *per curiam* opinion in *State v. Ferguson*, that the hearsay statements made to private individuals, not involved in any criminal investigation, were not barred by *Crawford*. Should the United States Supreme Court disturb that ruling in that it followed the guidance offered by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2000), and is in harmony with decisions of other courts post-*Crawford*?

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

1. Facts Of The Underlying Case.

In November 2002, the Petitioner, Brian Bush Ferguson, was convicted of premeditated murder, and was later sentenced to life imprisonment. The Petitioner asserts that the State's case against him was "based almost entirely upon hearsay evidence" and argues that it is the kind of hearsay prohibited by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). As shown by the following recitation of facts, that statement is entirely inaccurate. Moreover, hearsay statements that were admitted, would have been admissible under *Crawford*, which was decided while the Petitioner's case was on appeal.

On February 2, 2002, Jerry Wilkins, an active, popular West Virginia University (WVU) student in his final semester of graduate school, was fatally shot at approximately 7:20 p.m. Two witnesses to the shooting observed the victim being chased by an assailant and shot with a large handgun. As he ran from his assailant, Wilkins lost his footing and slid to the ground immediately adjacent to a car stopped at an intersection. The driver, Kathryn Metcalfe, watched as a man ran up and shot, point blank, into the back of the fallen man just outside the driver's side door. The bullet entered his heart. The assailant ran from the scene and disappeared into a residential area near the WVU Campus. Ms. Metcalfe later described the assailant as a black male, 6 foot to 6'2" tall, medium build, and wearing a dark, hooded jacket or sweatshirt (black or dark blue).

Another witness, Rachel Herman, also described the assailant as a black male, wearing black pants and a black, hooded sweatshirt. Ms. Herman described the handgun as long, and silver in color.[1]

The victim's condition immediately after the shooting, as described by witnesses at the scene, indicated that the only "remotely coherent" thing Jerry Wilkins expressed was that he couldn't breathe. Jerry Wilkins went into shock after the shooting and had no ability to respond rationally or to convey information. According to a first responding police officer, the victim wasn't even able to give his name in answer to a direct question. (Tr. Trans., Vol. VIII, pp. 192-193).

The Petitioner claims that Wilkins remained conscious for a time and spoke directly with police and medical personnel, but did not name his assailant. However, nothing in the testimony of witnesses, some who were friends and some merely acquaintances or strangers, suggested that the victim was consciously declining to identify his murderer, as claimed by the Petitioner. Although the Petitioner had access to the victim's medical records, he did not present any witness to support his claim that the victim was able to name his assailant and had either chosen not to, or had been unable to, identify him. There is no such evidence.

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[1] Rachel Herman described the shooter as weighing approximately 190 lbs. Two other witnesses, described the assailant as a black man with a black hooded sweatshirt, 6'1" to 6'2", 180 to 200 lbs., and 6 foot to 6'1", anywhere from 180 to 210 lbs. These descriptions generally fit the Petitioner.

After the shooting, detectives went to the hospital to gather information from friends of the victim. The Petitioner's name was given as a possible suspect because it was well known to his friends that Jerry Wilkins and the Petitioner had experienced difficulties with each other, and that in recent weeks Jerry had expressed to friends that the Petitioner had been following him and had been parked outside Jerry's apartment.

When police located the Petitioner at the residence of his girlfriend, Ebony Gibson, in the hours after the shooting, they obtained consent to search his vehicle and apartment. In the car police found and collected a navy, hooded jacket and a black, hooded sweatshirt similar to the witnesses' descriptions of the shooter's attire. At the Petitioner's apartment police found a .50 caliber Desert Eagle firearm. They also found and collected documents showing the Petitioner's purchase of a 9mm handgun from a local dealer on January 22, 2002, only days before the Wilkins murder.

Police also learned that the Petitioner was observed near the scene of the shooting shortly afterward. Data retrieved from the entry system at the WVU Recreation Center, less than a mile from the shooting, showed that the Petitioner had entered the center at 7:39 p.m. As observed by witnesses at the recreation center, some of his clothing was described as similar to that worn by the shooter. The Petitioner subsequently informed police that he swam in the pool there and later showered at Ebony Gibson's apartment before police arrived there.

On the night of the murder, the Petitioner agreed to go with detectives to the police department to answer questions regarding his whereabouts at the time of the

shooting. At the station he was advised that police intended to perform gunshot residue sampling on his person and clothing. Ferguson was seated in an interview room with the door ajar while officers prepared the gunshot residue kit. Although the Petitioner had exhibited an unflustered demeanor when first approached by police at Ms. Gibson's apartment, and during conversation at the apartment and while riding downtown, both detectives observed the Petitioner to immediately become visibly agitated when informed of the gunshot residue sampling, and to vigorously wipe his hands on his jacket when he thought he was not being observed by the detectives. He then began to exhibit other, very nervous mannerisms during the performance of the gunshot residue sampling and as his contact with police continued.

When first approached by police at Ebony Gibson's apartment, the Petitioner emphasized that he had owned only one firearm, the Desert Eagle later collected from his residence, and that he had not fired *any* firearm in over a year. However, the Petitioner subsequently called police on February 3, 2002, less than twenty-four hours after the murder, to report the theft of his 9mm handgun. He had realized that police had found the sales receipt for that weapon during their search of his apartment, and he needed to explain why he had neglected to mention the 9mm when police asked him what guns he owned. The Petitioner's explanation was that he had forgotten he owned that gun, although he had purchased it only nine days earlier. He also claimed not to remember the last time or place he had seen the 9mm, and he could not explain how it had been stolen from his residence, when there were no signs of forced entry.

Close friends of Jerry Wilkins testified that there had been a series of encounters between the victim and the Petitioner beginning in autumn 2000, from which the Petitioner had developed a strong animosity toward Jerry Wilkins. The anger stemmed from the Petitioner's belief that Jerry Wilkins was interested in Ebony Gibson.

In the fall semester 2000, Ms. Gibson had developed a friendship with Jerry Wilkins. On one occasion she gave him a ride to the downtown campus because Mr. Wilkins' car was being repaired. Also present in Ms. Gibson's car was Brian Ferguson. Ferguson accused Wilkins of being interested in Ebony and warned him to stay away from her. The encounter ended with Ferguson brandishing a knife and threatening Wilkins. Wilkins emerged from the car and immediately encountered first one and then another friend to whom he described the startling and alarming event. Word quickly spread about the incident, yet Wilkins did not encourage or permit any retaliation against Ferguson, nor did he ever report the incident to police, as urged by friends.

During WVU Homecoming in November 2001, a party was held at the fraternity to which Jerry Wilkins belonged. During the evening the Petitioner and his friend, Brian Johnson, arrived at the party. Because of the previous incident involving the Petitioner pulling a knife on Jerry Wilkins, Wilkins made it known that the Petitioner was not welcome at the fraternity house. The Petitioner said that he did not intend to leave because he had been invited to the party. He was escorted onto the porch, where he elbowed a fraternity brother. Wilkins' fraternity brother responded by hitting the Petitioner. Another fraternity brother escorted the Petitioner and Brian Johnson down the street. When the Petitioner made the threat that he

would "get Jerry when his fraternity brothers weren't around" one of the brothers struck the Petitioner, knocking him to the ground and another kicked him. The Petitioner was very angry about the incident, according to Brian Johnson, and continued to talk resentfully about it for a week and a half. (Tr. Trans., Vol. IX, pp. 22-25).

As the January 2002 semester began it became known that the Petitioner had been seen in his car parked outside Wilkins' apartment. The Petitioner's car was an easily recognized gold Lexus SUV. According to a friend who visited Wilkins on a night in mid-January 2002, the Lexus was leaving the parking area as the friend arrived. When the friend entered Jerry Wilkins' apartment, Jerry immediately asked if he had just seen Ferguson's car outside the apartment.

Close friend Solomon Wright testified that toward the end of January 2002, shortly before Wilkins' murder, he and Jerry had a conversation in which Jerry discussed his concern that circumstances were leading to a future confrontation between himself and the Petitioner. Solomon testified that Jerry had said that if anything happened to him, Solomon would know who it was.

The bullet that killed Jerry Wilkins was a .44 caliber magnum. Although the Petitioner had told police that he had only owned one gun in his life, the .50 caliber Desert Eagle, the Petitioner's good friend, Brian Johnson, informed police that he had seen a large revolver with stainless steel finish in the Petitioner's apartment within two weeks before the murder. According to Johnson, the Petitioner had called the gun a "magnum" and had described it as a "powerful" gun. This was not the .50 caliber Desert Eagle, with which Brian Johnson was familiar

because he had been present when the Petitioner purchased it. Ferguson told Johnson that a friend had given him the magnum. (Tr. Trans., Vol. IX, pp. 39-42).

In a conversation with Brian Johnson after the shooting, the Petitioner told Johnson that the murder weapon was "long gone, that police had no eyewitness to identify the perpetrator and that there was no gunshot residue." (Tr. Trans., Vol. IX, pp. 32-35). However, the jacket and sweatshirt retrieved from the Petitioner's possession on the night of the murder were tested and both showed the presence of gunshot residue.

The Petitioner testified in his own defense and presented several witnesses, including Ebony Gibson. Although Ms. Gibson acknowledged the conflict between Ferguson and Wilkins, she minimized the incident involving the Petitioner's threat with a knife by stating that only words were exchanged between the two men. She denied seeing a knife. However, State rebuttal witness Adrienne Batkins testified that Ebony Gibson had told her, shortly after the incident, that Ferguson had started a confrontation with Wilkins in Ebony's vehicle and had pulled a knife. (Tr. Trans., Vol. X, p. 205). It was also clear from Ms. Batkins' testimony that Ebony Gibson had maintained an interest in contacting or communicating with Jerry Wilkins shortly before the murder, continuing to fuel the resentment and anger of Ferguson toward Wilkins. (Tr. Trans., Vol. X, pp. 206-207).

In the trial the Petitioner was limited in his ability to present positive character evidence by the fact that the State had a large volume of bad character evidence, including threats of violence toward individuals in WVU dormitories resulting in his ejectment from student housing, and

firearm theft. The State also possessed a videotape showing the Petitioner engaged in the fraudulent use of a credit card to purchase merchandise. Although the State argued that the Petitioner's repeated references to his social status, family background and the prestigious positions held by his relatives constituted good character evidence justifying the State's impeachment by bad character evidence, the trial court declined to permit use of that evidence. (Tr. Trans., Vol. VI, pp. 188-190).

2. The *Non-Testimonial* Hearsay Statements Upheld By The West Virginia Supreme Court Of Appeals Do Not Fall Within Strictures Announced In *Crawford v. Washington*.

Because the facts of this case do not involve the core categories of hearsay statements that were found in *Crawford* to be in conflict with the Confrontation Clause and the intent of the Framers, this case is not sufficiently noteworthy for this Court to accept for review. Therefore, the Petitioner's case is not a proper vehicle to expand or limit the meaning of "testimonial" hearsay announced in *Crawford*.

Although *Crawford* provided some examples of testimonial and non-testimonial statements, it declined to provide a comprehensive definition of the term "testimonial." The Court also declined to set the limitations imposed by the Confrontation Clause, if any, on non-testimonial statements.

While *Crawford* did not spell out a comprehensive definition of "testimonial," it did specifically state that prior testimony and statements taken by police officers in the course of "interrogations" would fall within even the

narrowest definition of "testimonial." *Id.*, 124 S.Ct. at 1374. *Crawford* held that "police interrogations" are testimonial because they are closely analogous to the sixteenth and seventeenth century English practice of pre-trial examinations conducted by Magistrates, a practice against which the Confrontation Clause was intentionally directed.

Crawford also identified two other scenarios in which statements may be considered "testimonial":

- "Ex-parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that **declarants would reasonably expect to be used prosecutorially.**" (Emphasis added)

- "Statements that were made under **circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.**" (Emphasis added)

Id. at 1364.

Crawford says that a statement must exhibit a certain degree of formality before its admission at trial will give rise to Sixth Amendment concerns. The four testimonial statements enumerated by the Court (prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations) each reflect the requisite level of formality.

Crawford also says that:

> 'Testimony' . . . is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . [A]n accuser who

> makes a formal statement to government officers **bears testimony** in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an acute concern with a specific type of out-of-court statement. *Id.* at 1364.

As stated in *Crawford*, an off-hand, overheard remark "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id.* at 1364.

The statements to private individuals introduced in the Petitioner's trial bear little resemblance to the abuses targeted in *Crawford*, and would not fit within even the formulation of "circumstances that would lead an objective witness to believe that the statement would be available for use at a later trial."

3. The West Virginia Court's Holding Is In Accord With Many Other Decisions Applying *Crawford*.

After *Crawford* many courts have considered hearsay evidence resembling that in the Petitioner's case and have ruled similarly on admissibility. The Eighth Circuit recently addressed out-of-court statements that are very similar to the out-of-court statements admitted in the Ferguson trial. *Evans v. Luebbers*, 371 F.3d 438 (8th Cir. 2004). Evans argued that his Confrontation Clause rights were violated when the trial court admitted numerous out-of-court statements made by the victim, indicating her fear of the defendant because he was verbally and physically abusive to her, that she had obtained a protective order against him, and that she intended to divorce him. The court held that the admission of those statements in the

habeas petitioner's trial did not involve an unreasonable application of clearly established federal law because the statements fell within firmly-rooted hearsay exceptions, such as statements made for purpose of medical diagnosis and treatment and the state of mind exception, and that *Crawford* would not bar those non-testimonial statements.

In *Bell v. State*, 597 S.E.2d 350 (Ga. 2004), the court upheld admission of statements, that had been made by the victim to two relatives and a best friend, as non-testimonial, and applied admissibility standards established in prior state case law. In contrast, other statements made by the victim to police prior to her murder were found to be inadmissible because they were testimonial.

There are other cases in which even statements made to police were deemed non-testimonial because of the setting and circumstances. In *People v. Moscat*, 777 N.Y.S.2d 875 (2004 N.Y. Slip. Op. 24090), the court held that a domestic assault victim's 911 call for help is not testimonial. That court concluded that a 911 call for help is "essentially different in nature" from the testimonial materials that are excluded by the Confrontation Clause. The New York court contrasted a 911 call, which is generally initiated by the victim of a crime, to a station house interrogation.

In *State v. Barnes*, 854 A.2d 208 (Me. 2004), the Supreme Judicial Court of Maine held that statements made by a murder victim against her son, regarding an assault that had occurred prior to the murder, were not testimonial even though the statements were made to police at the station. The court upheld the admission of the declarant's statements as excited utterances because the victim had driven herself to the police station and had

described her son's attack upon her, and his multiple threats to kill her, while sobbing and obviously still suffering the physical and emotional trauma of the recent assault.

Thus, many courts have relied upon the language in *Crawford* that states:

> [W]here non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.

The West Virginia Supreme Court's reliance upon *Ohio v. Roberts*, 484 U.S. 56 (1980), is implicit in its opinion.

Other courts have relied upon the principal of "forfeiture by wrong-doing," also recognized in *Crawford*, and a concept that clearly applies in the Petitioner's case. In *State v. Meeks*, 88 P.3d 789 (Kan. 2004) police learned the name of the shooter from the victim before he died. Arguably, the officer was conducting an interrogation when he asked if the victim knew who had shot him. However, the Kansas Court decided that it was not necessary to determine whether the response was testimonial, holding that the defendant had forfeited his right to confrontation by killing the witness. The court cited the *amicus* brief in *Crawford* by law professors Clark, Duane, Friedman, Garland, Maveal, McCormack, Moran, Mueller and Park, who said:

> If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the

> confrontation right, even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable. Just as in *Bourjaily*, boot-strapping does not pose a genuine problem. *State v. Meeks*, supra.

Forfeiture by wrongdoing was acknowledged in *Crawford* to have continuing viability.

In *Horton v. Allen*, 370 F.3d 75 (1st Cir. 2004) the habeas petitioner challenged the admission of statements an accomplice had made to a third party in a private conversation. The court determined that the hearsay statement was not testimonial under *Crawford*, and then found that the statement fell within the firmly rooted state of mind exception to hearsay.

After *Crawford*, the *Roberts* reliability test for determining the admissibility of hearsay evidence was held to still apply to non-testimonial hearsay as a matter of state constitutional law in *People v. Compan*, 100 P.3d 533 (Colo. App. 2004, cert. granted 10-25-04). The victim of assault and domestic violence had left the country and could not be found by the prosecutor. Instead, statements of the victim were presented pursuant to the excited utterance and statements made for the purpose of medical diagnosis/treatment exceptions. The court held that the victim's statements were not made for the purpose of establishing facts in a subsequent criminal proceeding and were not testimonial.

In *Stancil v. United States*, 866 A.2d 799 (D.C. 2005), cited by the Petitioner, the District of Columbia Court of Appeals remanded a domestic violence case for further determination of whether statements of the defendant's

wife to police responding to the home after a 911 call, were testimonial or were excited utterances and, therefore, non-testimonial. The court provided much guidance upon remand through a thorough discussion of the hearsay statements at issue. For example, the court opined that information given by victims/witnesses when police are responding to an emergency call and are engaged in preliminary questioning are not statements given for the purpose of prosecution and are not testimonial. The D.C. court also recognized that, depending upon circumstances, even some "excited utterances" to police are testimonial. However, the court stated, "It is unlikely that the [Supreme Court] intended the term [testimonial] to embrace contacts with the police that do not amount to interrogations."

In *State v. Forrest*, 596 S.E.2d 22 (N.C. App. 2004), a victim's statements to police immediately after the crimes were committed were held to be non-testimonial. The North Carolina court held the statements concerning her kidnapping and violent assault were admissible as excited utterances because they were made immediately after her rescue by police, with no time for reflection. The court also noted that the statements were initiated by the victim and not the product of police questioning. Clearly then, a number of courts have construed that even some statements to *police* are considered non-testimonial, decisions which are in accord with *Crawford's* guidance.

State v. Rivera, 844 A.2d 191 (Conn. 2004) involved a statement by a co-conspirator, which superficially would appear similar to the facts in *Crawford*. However, the Connecticut court noted that the co-conspirator's inculpatory statement about himself and the defendant had been made in confidence to a close family member almost

eighteen months before the defendant was arrested and more than four years before the co-conspirator's own arrest. The court found that the declarant's communication did not fall within the category of ex-parte testimonial statements. The Connecticut court held that, because the hearsay statement was non-testimonial, application of the *Roberts* test for reliability was appropriate.

In the Petitioner's case, the trial court held an extensive pre-trial evidentiary hearing on the State's WVRE 404(b) notice regarding its intent to introduce evidence of the Petitioner's threat toward the victim that had occurred in autumn 2000, which the victim had immediately reported to his friends, not to police. The court ruled that the criteria necessary to demonstrate an excited utterance were met and allowed the evidence for the purpose of showing intent, motive and identity. Use of the *non-testimonial* excited utterance of Jerry Wilkins to his friends regarding the Petitioner threatening him with a knife, was upheld by the West Virginia Supreme Court of Appeals because it was reliable hearsay, not a statement made to police, and by implication, clearly was not a statement made in anticipation of prosecutorial use. There was never a report to police of that incident and no prosecution.

The West Virginia Supreme Court of Appeals also correctly upheld the admission of the *non-testimonial* pre-murder statements made by the victim, about the future likelihood of having to confront or fight the Petitioner, and that if something happened his friend would know who was involved, as a then-existing mental/emotional condition exception to hearsay. Jerry Wilkins' statement to Solomon Wright is similar to *Smith v. State*, 2004 WL 1109922 (Alaska App. Ct., 4/27/04), in which evidence of an

earlier threatening phone call to the murdered victim was found to be non-testimonial and admissible as a then-existing state of mind exception to hearsay. The statement by Wilkins to his friend is far from a statement made with the awareness or the intent that it would be used in a future trial. The West Virginia Supreme Court of Appeals held:

> We do not perceive that *Crawford's* largely unexplored ban on "testimonial hearsay" that has not been tested by cross examination extends to statements to non-official and non-investigatorial witnesses, made prior to and apart from any governmental investigation, that are issues in this case.

The clear implication of the West Virginia Supreme Court was that the statements were not made in circumstances in which the declarant (the subsequently murdered victim) would anticipate his statement being used against the accused in the prosecution of an unthinkable crime.

The Georgia Supreme Court addressed similar evidence in *Demons v. State*, 595 S.E.2d 80 (Ga. 2004). In that case the deceased victim's hearsay statements made during a conversation with a friend before commission of the crime were non-testimonial. The court found that such statements were not similar to information given to police during interrogation, which are generally made with the expectation or awareness that the statements may be used at a later trial.

4. The West Virginia Supreme Court Of Appeals Has Not Limited Testimonial Hearsay To *Only* Statements Made To Official Or Investigative Witnesses.

The Petitioner argues that the Supreme Court of Appeals of West Virginia held that an out-of-court statement is "testimonial hearsay" *only* if it is made to an "official" or "investigatorial witness" as part of a governmental investigation. He states that both the Fifth and Sixth Circuits have held that such statements may be testimonial in other circumstances as well. However, the Petitioner misconstrues the West Virginia court's opinion, which expressed the belief that *Crawford* did not extend to the statements between private individuals introduced in the Ferguson case, which statements were made at times prior to any thought of a governmental investigation. The court's opinion does *not* hold that *only* statements made to police would be considered testimonial, but merely decided the specific questions presented.

The Petitioner then cites *Guidry v. Dretke*, 397 F.3d 306 (5th Cir. 2005), asserting that the Fifth Circuit held that statements made by a co-conspirator to his girlfriend – who was neither an official nor an investigatory witness – were barred by *Crawford*. However, such a case, involving hearsay statements by a co-conspirator, who had every motive to shift blame to the defendant, is inapposite to the issues under scrutiny in the Ferguson case. Indeed, in the state proceedings preceding the Fifth Circuit's review, the state supreme court had ruled the statements should not have been admitted because there was no hearsay exception to support admission and the statements were unreliable, but found the evidence harmless. Most courts would consider that specific hearsay to be inadmissible, and so

would the West Virginia Supreme Court of Appeals, regardless of the testimonial formulation applied.

The Petitioner cites *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004), pointing out that the Sixth Circuit explicitly rejected the proposition that testimonial hearsay is limited to statements made "directly to authorities." *Cromer* involved admission of a hearsay statement made to police by a confidential informant who was participating in a surveiled drug transaction. Of course the statements were intended for use in the prosecution of the case, and were clearly testimonial.

Neither is the West Virginia court's definition of "testimonial" in conflict with definitions articulated by the First and Ninth Circuits, and the highest courts of Connecticut, Maryland, Nebraska, and Nevada, as asserted by the Petitioner. The Petitioner cites *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004), *cert. denied*, 125 S.Ct. 971 (2005). In *Horton*, the court held that the hearsay statements of the defendant's accomplice were not testimonial under *Crawford*. The hearsay testimony admitted at trial was that, on the day of the murders, the defendant's accomplice told witnesses that he needed money and that the victim had refused to give him drugs on credit. The statement was admitted under the state of mind exception to hearsay. The court stated that the statements were made during a private conversation with another witness, and summarized by saying "in short, Christian did not make the statements under circumstances in which an objective person would reasonably believe his statement would be available for use at a later trial." The West Virginia Supreme Court of Appeals articulated a similar analysis by stating that *Crawford* does not bar "statements to non-officials and non-investigatorial witnesses,

made prior to and apart from any governmental investigation. . . ." (emphases added), i.e., in circumstances that could not lead an objective person to believe that he was producing testimony.

In *State v. Rivera*, 844 A.2d 191 (Conn. 2004), also cited by the Petitioner, the statement that was upheld was by an accomplice to a family member, admitted under the penal interest exception. The court stated " . . . [U]nlike a statement to police, the circumstances under which the statement was made would not lead an objective witness to believe that the statement would be available for use at a later trial." The opinion in *Rivera* was similar to the opinion of the West Virginia Supreme Court of Appeals in *Ferguson*, in that the distinguishing feature between statements made to police and statements made to private citizens is that a declarant speaking to a private individual would not reasonably suspect the statement would be utilized in a later trial.

In *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004) entries from the deceased victim's diary admitted against the defendant were obviously neither ex parte testimony, statements made to police, or the like. Therefore, the court had only to decide that the diary entries were not testimonial because they were not created under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial, i.e., the entries were made prior to and apart from any governmental investigation.

Nothing in the opinion of the West Virginia Supreme Court of Appeals is in conflict with *State v. Snowden*, 867 A.2d 314 (Md. 2005), as claimed by the Petitioner. In *Snowden*, the Maryland court held that children's

statements to a sexual abuse investigator were testimonial. Therefore, admitting them under the tender years statute violated the Confrontation Clause. The interviews of the children were formal, structured interrogation conducted by a licensed sexual abuse investigator after police had informed her of the substance of the children's accusations, and the identity of the perpetrator was known. The West Virginia Supreme Court of Appeals would similarly consider those statements to have been made to official and investigatorial witnesses, after the initiation of a governmental investigation and as a part of that investigation. Whether an analysis utilizes the language of the West Virginia court or the Maryland court is immaterial. The outcome would be the same.

The Petitioner cites *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004) as a court with which the West Virginia Supreme Court of Appeals is in conflict. In *Vaught*, the court found that statements made by a child to a physician, including the identity of the perpetrator of sexual abuse, were not testimonial and were admissible as statements made for purposes of medical diagnosis and treatment. *Vaught* cited *Horton v. Allen, supra* in recognizing that *Crawford* provided three different formulations of the core testimonial statements, while declining to settle on a single formulation. The Nebraska court recognized the statements at issue did not fit any of the *Crawford* formulations, and therefore were not testimonial. The analysis is little different from that of the West Virginia Supreme Court of Appeals, which held that the hearsay statements at issue in the Petitioner's case were not made as a part of any governmental investigation and, implicitly, were not made with an eye toward a later trial.

Finally, the West Virginia Supreme Court of Appeals is not in conflict with the highest court of Nevada in *City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004), as alleged by the Petitioner. That case addressed an affidavit prepared by a healthcare professional solely for use at trial by the prosecution. The Supreme Court of Nevada held that the evidence was clearly testimonial under *Crawford*. The West Virginia court would reach the same conclusion under the same analysis if confronted with the same issue.

REASONS FOR REFUSING THE WRIT

1. The West Virginia Supreme Court Of Appeals Is Not In Conflict With Decisions Of Federal Appellate Courts Or The Highest Courts Of Other States.

As explained in the previous section, the West Virginia Supreme Court's opinion in the Petitioner's case is not in conflict with the courts identified by the Petitioner, either in the outcome of the case or the actual analysis of the issue before it. The West Virginia Supreme Court in its *per curiam* opinion, was deciding only the discrete issues presented. Therefore, for the Petitioner to claim that the West Virginia Supreme court was limiting its definition of testimonial evidence to only those statements made to police during an investigation, is unfounded. In fact, there is no logic to suggest that the West Virginia court would have ruled differently in the cases cited by the Petitioner, when presented with the same issues, or vice versa.

The Petitioner seems to claim that the West Virginia Supreme Court should have expressly discussed whether the hearsay statements had been made in circumstances

which would lead an objective witness to reasonably believe that the statements would be available for use at a later trial. Certainly, the West Virginia court impliedly considered that question and found that a private conversation between two friends was not a situation in which either the speaker or the listener would have foreseen the utility of the statement in a later trial for a shockingly uncontemplated crime, as imparted by the language "statements . . . made prior to and apart from any governmental investigation." The fact that the West Virginia court did not utilize particular language from *Crawford* in its analysis and holding, neither invalidates the holding nor puts the court in conflict with other courts considering hearsay questions after *Crawford.*

2. The Petitioner's Case Is Not A Suitable Vehicle For This Court To Revisit *Crawford* Because The Case Does Not Involve The Kind Of Hearsay Statements That Any Court Has Deemed Testimonial.

Certainly, the core of testimonial hearsay statements, such as prior ex parte testimony, affidavits, formal statements given to police in structured interview settings must be included in the definition of "testimonial" hearsay. Statements made to persons whom a reasonable declarant could believe were in a position to collect evidence involving or leading to a criminal investigation, including police officers, social workers, child forensic interviewers and individuals who are agents of police in some capacity, may complete the definition of "testimonial" hearsay.

The statements at issue in the Ferguson case do not fit within any of those categories, as it is clearly unreasonable to believe that Jerry Wilkins made the statement

regarding his then-existing concern about a future conflict with Brian Ferguson under the belief that the statement could be used at a trial to identify his actual *murderer*. Neither was his excited utterance to friends about the Petitioner's knife threat, approximately one and one-half years before the murder, made with a reasonable belief that it would be used at a later trial. After that incident Wilkins never reported it to police, sought a protective order or took any other action.

To include the hearsay statements admitted in the Petitioner's trial in the definition of testimonial evidence would expand the meaning far too broadly. It has been argued by Professor Robert Mosteller that all "accusatory" statements, regardless of timing and context, should be considered testimonial. *"Testimonial" And The Formalistic Definition – The Case For An "Accusatorial" Fix*, Robert P. Mosteller, *Criminal Justice*, A.B.A., Vol. 20, No. 2. However, such a formulation would be overbroad, given the variety, informality and realistically non-accusatory nature of most such statements. Those statements should be admissible as long as the reliability requirements of the hearsay rules are otherwise satisfied, as permitted by *Roberts*. To apply *Crawford* so widely would undermine the ability of prosecutors to obtain convictions for serious crimes where direct evidence of motive, intent and identity is lacking. No appellate cases have applied such a far-reaching definition.

Any interpretation of the term "testimonial" beyond the express holding of *Crawford* must be done carefully with close adherence to the rationale underlying the *Crawford* opinion. *Crawford's* reasoning and, in particular, the Court's reference to the Framers' concern with the government's employing abusive practices to produce

evidence against an accused, strongly suggest that the Confrontation Clause is not concerned with statements given to purely private parties, or to government officials not acting with an evidence-producing purpose.

All of the historical references in *Crawford* are to governmental officials or entities acting in an investigatory capacity as interrogators to produce evidence against an accused. *Crawford* refers to "judicial officers," "justices of the peace," "other officials," "the Privy Council," "the mayor," "a coroner," "the Governor," "several commissions," "judicial examination," and "the court," as its historical examples. There is not a single reference to a private party or entity.

The conclusion that the Clause does not apply to the "private person" context is further bolstered by *Crawford's* citation to *Dutton v. Evans*, 400 U.S. 74 (1970), in which this Court upheld the use at trial of a co-conspirator's statement against the defendant to a fellow prisoner. *Crawford* unambiguously states that the hearsay statement at issue in *Dutton* was "not testimonial." In the same paragraph, *Crawford* also contrasts the *Dutton* non-testimonial statement to the testimonial statements in *Roberts v. Russell*, 392 U.S. 293 (1968), *Bruton v. United States*, 391 U.S. 123 (1968), and *Douglas v. Alabama*, 380 U.S. 415 (1965). The accusatorial accomplice statements in those three cases were all made knowingly to governmental officials purposely attempting to produce evidence against an accused. The statement in *Dutton* was deemed non-testimonial, while the statements in the other three cases were deemed testimonial. These examples demonstrate that *Crawford's* prohibition against "testimonial" hearsay was not intended to apply to statements made in the private individual context.

After *Crawford*, in *United States v. Saget*, 377 F.3d 223 (2nd Cir. 2004), cited by the Petitioner, the court held that a co-conspirator's statement against the defendant in a private setting to a confidential informant, whose true status was unknown to the co-conspirator, did not constitute testimony, again relying upon on the interpretation that *Crawford* does not apply to private individuals or in settings where the speaker is unaware that he is providing information to an individual with an evidence producing purpose.

It has been stated that the chief purpose of the Confrontation Clause is to control governmental misconduct in creating or shaping testimony, whether intentionally or accidentally. Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington, Criminal Justice*, A.B.A., Vol. 20, No. 2. A definition of testimonial hearsay that meets that goal would be clearly sufficient to protect the Confrontation Clause rights of criminal defendants, and certainly would not include the kinds of hearsay introduced in the Petitioner's case.

Broadening the definition of testimonial beyond those core formulations discussed in *Crawford* would have the effect of undermining the finality of a multitude of decisions reached in reliance upon the guidance offered by *Crawford* and adopted by lower courts.

CONCLUSION

It was made clear in *Crawford* that non-testimonial hearsay statements are not subject to the prohibitions of the Confrontation Clause. Statements are not testimonial

unless each of the following is present: (1) the statement was obtained by an investigative government official or agent, (2) the government official's primary purpose was to produce evidence for use at a future prosecution, (3) the declarant knew that he or she was providing information that could be used in a future prosecution. Only when each of these three components is present can a statement be deemed to resemble those that were generated by the evil practices at which the Confrontation Clause was directed, or their modern day equivalent. Only then can an out-of-court declarant be considered a "witness" within the meaning of the Clause.

The West Virginia Supreme Court of Appeals correctly found that the hearsay statements admitted in the Petitioner's trial are non-testimonial and do not offend the Confrontation Clause. The Petition for a Writ of Certiorari should be refused.

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No. 04-1328

IN THE

Supreme Court of the United States

BRIAN BUSH FERGUSON,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Since the filing of our Petition, the conflict among the lower courts regarding the definition of "testimonial hearsay" – a conflict reflected, but never acknowledged, in Respondent's Opposition – has continued to widen. In the last four months, the Tenth Circuit and the highest courts of at least three states have departed from the narrow definition of "testimonial" adopted by West Virginia's highest court, applying instead a standard focused on the reasonable expectations of the hearsay declarant.[1] During the same period, two state courts of last resort have endorsed the West Virginia approach.[2] There is now a compelling need for resolution of the important Sixth Amendment question left unanswered in *Crawford v. Washington*, 541 U.S. 36 (2004).

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[1] *See United States v. Summers*, __ F.3d __, 2005 WL 1694031, at *10 & n.9 (10th Cir. July 21, 2005) (statement testimonial where "a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime"); *State v. Smith*, __ So.2d __, 2005 WL 1507773, at *1 (La. June 24, 2005) (*per curiam*) (statement not testimonial where "no objective person could have reasonably believed that the statement . . . would be used later at trial"); *State v. Hembertt*, 696 N.W.2d 473, 482-83 (Neb. 2005) ("The determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial."); *State v. Davis*, 111 P.3d 844, 850 (Wash. 2005) (*en banc*) (similar); *see also* Pet. at 8-9 (citing cases).

[2] *See Roy v. United States*, 871 A.2d 498, 505 (D.C. 2005) (statement not testimonial because not made to police for purposes of accusation or prosecution); *State v. Wilkinson*, __ A.2d __, 2005 WL 784931, at *3 (Vt. Apr. 8, 2005) (statement not testimonial because it "was not given to the police and did not occur during the course of the police investigation"); *see also* Pet. at 9-10 (citing cases).

See id. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

Nothing in Respondent's Opposition undermines the position, advanced in our Petition, that this case presents an ideal vehicle for the Court to resolve that issue. Respondent incorrectly asserts that the West Virginia court "impliedly considered" whether an objective witness would reasonably believe that the challenged statements at issue here would be available for use at a later trial. Br. in Opp. at 22. That assertion finds no support in the court's decision; to the contrary, the West Virginia high court expressly held that the challenged hearsay statements were nontestimonial because they were made "to non-official and non-investigatorial witnesses, . . . prior to and apart from any governmental investigation." Pet. at 4a.[3]

Had the West Virginia court applied a less rigid formulation of "testimonial" that focused instead on the reasonable expectations of the hearsay declarant, the statements at issue in this case would have been excluded. Jerry Wilkins told his friend, Solomon Wright, that "if something ever happen[ed]" to him, Petitioner should be held responsible. On its face, that is a statement made with the intent and expectation that, in the event harm ever came to Wilkins, the statement would be passed on to the authorities. Indeed, Respondent expressly argued to the jury at closing that Wilkins *believed* his statement to Wright to be the equivalent of a positive identification of Petitioner to the police at the scene of the crime:

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[3] Indeed, the test proposed by Respondent is no less mechanical than that used by the West Virginia court. *See* Br. in Opp. at 25-26 (contending that only statements "obtained by an investigative government official or agent" can be testimonial).

> But [Wilkins] also said to Solomon Wright, "If something happens to me, you will know who." And while Jerry wasn't able to at the actual time of his death to tell anybody who had shot him, he knew that people would know.... Jerry Wilkins couldn't, but didn't need to tell who killed him because he had told Solomon Wright and because people knew of that view and he had predicted that something would happen to him and something bad did happen.

(11/25/02 Tr. at 272.) Having argued precisely the opposite to the jury at closing, Respondent should now not be heard to contend that "a private conversation between two friends was not a situation in which either the speaker or the listener would have foreseen the utility of the statement in a later trial." Br. in Opp. at 22.

Similarly, when Wilkins told several of his friends and fraternity brothers that Petitioner had threatened him with a knife, a reasonable person in Wilkins's position would have foreseen that such accusations might be used in the investigation or prosecution of a crime. Indeed, the record here confirms that Wilkins *actually knew* that his statements about the knife incident were likely to be passed on to authorities. As Respondent points out, Wilkins found it necessary to discourage his friends from taking any immediate action in response to his accusations. Br. in Opp. at 5; *cf.* 11/21/2002 Tr. at 54-55 (fraternity brother's testimony that Wilkins declined to report knife incident to police, despite friends' urging). It is thus clear that a reasonable person in Wilkins's position would have foreseen – and indeed Wilkins himself did foresee – that his accusations "might be used in the investigation or prosecution of a crime." *Summers*, 2005 WL 1694031, at *10.

Without these hearsay statements, the evidence before the jury was not sufficient to sustain a conviction. Respondent characterized Wilkins's conversation with Wright as "perhaps . . . the most important testimony in the case," and the trial court stated that the testimony about the knife incident was "a key piece of evidence for the state," without which Respondent's case was "much weaker." (11/25/2002 Tr. at 271; 201.) Respondent's selective and largely unsubstantiated recitation of the "facts," coupled with improper references to "evidence" not even before the jury (Br. in Opp. at 7-8), cannot alter the conclusion that, but for the hearsay testimony at issue here, Petitioner would not have been convicted.

Finally, Respondent suggests in passing that this Court need not consider whether Wilkins's statements were "testimonial" because of the rule of forfeiture by wrongdoing. Br. in Opp. at 12-13. Respondent's suggestion is a red herring. The West Virginia high court made no mention of the forfeiture doctrine in its opinion. Rather, the sole basis for the state court's *Crawford* determination was its erroneous conclusion that the hearsay statements at issue were nontestimonial. Pet. at 4a-5a. Any questions about the scope and applicability of the forfeiture doctrine should be resolved in the first instance by the courts of West Virginia.[4]

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[4] In any event, the applicability of the forfeiture doctrine in this case is doubtful at best. *See, e.g., United States v. Jordan*, No. 04-CR-229-B, 2005 WL 513501, at *5-6 (D. Colo. Mar. 3, 2005).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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